

Proposed Rule for Water Withdrawal Contracts from Reservoirs
under P.L. 231-2007 and IC 14-25-2
Administrative Cause No. 07-100W

The most-recent session of the Indiana General Assembly enacted House Enrolled Act 1738 (P.L. 231-2007) to amend IC 14-25-2 which governs water sales contracts from state-owned reservoirs, including provisions for minimum stream flows. The legislation was signed by Governor Daniels, and with an emergency clause, is now effective.

P.L. 231-2007 will require the development of substantive standards. A request for permanent rule adoption by the Natural Resources Commission is anticipated, but because the statutory changes are already in effect, the DNR Director will also consider a temporary rule for the interim. Proposals for substantive standards are still in formulation and not ready for review.

A key provision of P.L. 231 is an extensive notice-and-review process for new and renewed sales contracts. This process has a specific role for the Natural Resources Advisory Council. As provided in part in new IC 14-25-2-2.5:

- ...
- (h) The advisory council established by IC 14-9-6-1 shall hold a public meeting in each county in which notice is published.... A public meeting required under this subsection must include the following:
- (1) A presentation by the department describing:
 - (A) the nature of the pending request; and
 - (B) the process by which the commission will determine whether to enter into a contract with the person making the request.
 - (2) An opportunity for public comment on the pending request.
- The advisory council may appoint a hearing officer to assist with a public meeting held under this subsection.

Following as *Appendix A* is a proposal that provides a general structure for rule adoption. *Appendix A* does not yet include substantive provisions but does offer direction concerning procedures in **Rule 3**, including a proposed delegation for conduct of the public meeting, with affirmation and clarification of the Advisory Council's role in reviewing the hearing officer's report, considering additional materials, and making recommendations to the Natural Resources Commission. The Advisory Council is requested to review *Appendix A*, with particular reference to **Rule 3**, and to consider giving its endorsement to the proposal as to procedure. The endorsement would be valuable to the DNR Director in considering a temporary rule, as well as in the development of a proposal to the Commission for a permanent rule. A proposal for preliminary adoption of a permanent rule, which also includes substantive provisions, would be tendered to the Advisory Council at a later date.

Appendix A

Water Withdrawal Contracts (Advisory Council)
Administrative Cause No. 07-100W
June 6, 2007

TITLE 312 NATURAL RESOURCES COMMISSION

Proposed Rule
LSA Document #07-

DIGEST

Adds 312 IAC 6.3 to assist with the application of P.L. 231-2007 to IC 14-25-2 with respect to water withdrawal contracts for water supply purposes from the water supply in reservoir impoundments that are financed by the state. Amends 312 IAC 1-1-4 to update a cross-reference to the definition of “board”. Effective 30 days after filing with the Publisher.

SECTION 1. 312 IAC 1-1-4 IS AMENDED TO READ AS FOLLOWS:

312 IAC 1-1-4 “Board” defined

Authority: IC 14-10-2-4

Affected: IC 14; IC 25

Sec. 4. “Board” means each of the following:

- (1) Advisory council ~~for the bureau of lands and cultural resources.~~
- ~~(2) Advisory council for the bureau of water and resource regulation refers to the~~
advisory council established by IC 14-9-6-1.
- ~~(3) (2) Board of trustees for the division of state museums and historic sites.~~
- ~~(4) (3) Commission.~~
- ~~(5) (4) Historic preservation review board.~~
- ~~(6) Soil conservation board.~~
- ~~(7) (5) Surface coal mine reclamation bond pool fund committee. (Natural Resources Commission; 312 IAC 1-1-4; filed Dec 1, 1995, 10:00 a.m.: 19 IR 656; readopted filed May 8, 2001, 3:51 p.m.:24 IR 2895)~~

SECTION 2. 312 IAC 6.3 IS ADDED TO READ AS FOLLOWS:

312 IAC 6.3 Water Withdrawal Contracts from State Reservoirs

Rule 1. Applicability

312 IAC 6.3-1-1 Purpose and scope

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

Sec. 1. (a) **This article assists with the application of P.L. 231-2007 to IC 14-25-2.**

(b) The article applies to contracts for the withdrawal or to obtain the release of water from a reservoir, including provisions for:

- (1) The review of contract proposals.**
- (2) The administration of contracts.**
- (3) The expiration or other termination of contracts.**

(c) A person must not withdraw or obtain the release of water from a reservoir except as provided in:

- (1) the terms of a contract; or**
- (2) an exemption from a contract requirement under IC 14-25-2 and this article.**

(Natural Resources Commission; 312 IAC 6.3-1-2)

312 IAC 6.3-1-2 Applicability to contracts for water withdrawals

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

Sec. 2. (a) This article governs the procedures for, and the substance of, consideration of any contract proposal made to the state, and submitted to the division after December 31, 2008, for the withdrawal or release of water from the water supply storage of a reservoir.

(b) A contract for the withdrawal or release of water supply storage from a reservoir, which was entered by the state before January 1, 2009, is governed by the terms of the contract and by any statute or rule in effect when the contract was entered.

(c) Upon the expiration or termination of a contract governed by subsection (a) or (b), any water withdrawal or taking of a release must cease unless a new contract is approved under IC 14-25-2 and this article. *(Natural Resources Commission; 312 IAC 6.3-1-2)*

312 IAC 6.3-1-3 Administration by the department's division of water

Authority: IC 14-10-2-4; IC 14-25-1-11

Affected: IC 14-10-2-3; IC 14-25-2

Sec. 3. (a) The division [of water of the department of natural resources] shall serve as the point of contact and shall coordinate the administrative, professional, and technical functions of this article.

(b) Subject to IC 14-10-2-3, the division director shall issue any order appropriate to implementation of this article. *(Natural Resources Commission; 312 IAC 6.3-1-3)*

Rule 2. Definitions

[To be described later]

Rule 3. Procedures

312 IAC 6.3-3-1 Request for water withdrawal or release from a reservoir

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

Sec. 1. (a) A person that seeks to contract with the commission, for the provision of certain minimum quantities of stream flow or the sale of water on a unit pricing basis under IC 14-25-2-2, must submit a written request to the division under this article.

(b) A written request under subsection (a) must be completed on a division form and must include the following information:

(1) The name, address, and telephone number of the following:

(A) The person making the request.

(B) At least one (1) individual who serves as a point of contact for the person making the request.

(2) The location where any withdrawal or release from a reservoir would occur.

(3) The intended purpose of the withdrawal or release.

(4) The estimated quantity of water to be used annually.

(5) A description of the method of withdrawal or use of a release.

(6) A description of the type of metering system to measure or method used to estimate the amounts of withdrawal or use from a release.

(c) A written request under subsection (a) is not complete until the person submits, as part of the application, a contingency plan that describes the alternatives the person will use if the withdrawal or release of water from the reservoir is restricted due to a drought alerts described in 312 IAC 6.3-5-2. A contract shall not be executed unless:

(1) the contingency plan is feasible; or

(2) the person seeking the contract agrees to withstand the results of not being able to receive water from the reservoir. *(Natural Resources Commission; 312 IAC 6.3-3-1)*

312 IAC 6.3-3-2 Notice by division of water to interested persons

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

Sec. 2. The division shall provide notice to interested persons as follows:

(1) Not later than thirty (30) days after receiving request under section 1 of this rule, provide notice by certified mail to the persons described in IC 14-25-2-2.5(c).

(2) As soon as practicable, cause notice by publication in each county described in IC 14-25-2-2.5(f). *(Natural Resources Commission; 312 IAC 6.3-3-2)*

312 IAC 6.3-3-3 Public meeting

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

Sec. 3. (a) The division director shall appoint a department employee to serve as hearing officer for any public meeting under IC 14-25-2-2.5(h).

(b) The public meeting shall include the following:

(1) A presentation by the department describing the:

(A) nature of the pending request; and

(B) process by which the commission will determine whether to enter into a contract with the person making the request. The process shall reference IC 14-25-2 and this article.

(2) An opportunity for public comment on the pending request.

(c) A hearing officer shall conduct the public meeting in a manner that is best suited to the solicitation of public comments in support of fact finding. The public meeting is a nonevidentiary meeting, and neither the rules of evidence nor IC 4-21.5 apply.

(d) A hearing officer may maintain a record of any portion of the public meeting to assist in providing written recommendations to the advisory council. Any other person may also cause a recording to be made of the public meeting, but any official record is maintained by the hearing officer. (*Natural Resources Commission; 312 IAC 6.3-3-3*)

312 IAC 6.3-3-4 Advisory council report summary and recommendations

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

Sec. 4. (a) As soon as practicable following the public meeting, the hearing officer shall deliver a written summary of the meeting and any recommendations to the advisory council.

(b) The advisory council shall consider the hearing officer's recommendations during a public meeting held under IC 5-14-1.5.

(c) The advisory council is not limited to the written summary and recommendations the hearing officer, but may also consider:

(1) Recommendations of the division of state parks and reservoirs or another division of the department that manages the reservoir from which the water would be withdrawn or released.

(2) Recommendations from a federal, state, or local agency with expertise regarding water usage and supply.

(3) Information received during a public meeting of the advisory council.

(d) Not later than thirty (30) days after the final public meeting under section 3 of this rule, the advisory council shall submit to the commission a report summarizing the public meeting. The report may be accompanied by recommendations which duplicate, augment or contrast with those of the hearing officer. (*Natural Resources Commission; 312 IAC 6.3-3-4*)

312 IAC 6.3-3-5 Commission action on contract and subsequent approvals

Authority: IC 14-10-2-4; IC 14-25-2-5

Affected: IC 14-25-2

Sec. 5. (a) During a public meeting under IC 5-14-1.5, the commission may deliberate as to whether to approve a person's written request for the provision of certain minimum quantities of stream flow or for the sale of water on a unit pricing basis.

(b) The commission shall include in its deliberations a consideration of the following:

- (1) The standards provided by IC 14-25-2 and this article.**
- (2) The report of the advisory council under subsection 4(c) of this rule.**
- (3) Other statements or documents the commission elects to receive before or during the meeting.**

(c) Consistently with subsection (b), the commission shall determine to approve, condition, or deny a person's request and may elect to execute a contract under IC 14-25-2-2(a)(1). If the commission elects to execute a contract, the contract shall be delivered to the division.

(d) Within twenty (20) days after receiving a contract delivered under subsection (c), the division shall do the following:

- (1) Prepare a memorandum relative to the effect the contract might have on recreational facilities.**
- (2) Submit the memorandum to the governor for the governor's consideration.**

(e) A contract executed by the commission under subsection (c) is subject to approval by the:

- (1) Attorney general.**
- (2) Governor.**
- (3) Person desiring the use. *(Natural Resources Commission; 312 IAC 6.3-3-5)***

Rule 4. Contract terms and conditions

[To be described later]

Rule 5. Drought alerts and emergencies

[To be described later]

Rule 6. Enforcement

[To be described later]